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## Justice Oliver Wendell Holmes: Law and the Inner Self

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JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF.  
By G. Edward White. Oxford: Oxford University Press. Pp. ix,  
628. \$37.50.

G. Edward White<sup>1</sup> has embraced a task of monumental proportions. A biography concentrating on either the life or the work of Oliver Wendell Holmes, Jr. must be complex and thorough; one exploring the interaction between the two promises to be herculean. Yet White emerges victorious in the end, letting his extensive research, lucid prose, and keen insights guide the reader effortlessly through the 490-page biography.

White begins his journey with an autobiographical statement Holmes wrote as a senior at Harvard College (p. 7). The statement frames the opening chapter, "Heritage," as it introduces the subjects upon which White will initially focus: Holmes's father, mother, ancestors, experience at Harvard College, and early literary endeavors (pp. 7-8). The author first discusses Holmes's complex relationship with his father, Dr. Oliver Wendell Holmes, Sr. — author of the *Autocrat* essays,<sup>2</sup> poet, and Harvard Medical School professor (pp. 9-11). Dr. Holmes was "one of the last true generalists . . . a prime mover in an astonishing range of fields: in medicine, psychology, and theology, as well as in lecturing and literature."<sup>3</sup> White carefully delineates various aspects of the father-son relationship, noting both parties' competitiveness, egotism, and concealed affection for each other (pp. 11-14). The author asserts that Holmes adopted his father's idea of a "life plan," but that his self-preoccupation, in contrast to his father's vivaciousness, channelled his achievements into one field — the law.<sup>4</sup> Next comes Amelia

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1. University Professor and John B. Minor Professor of Law and History, University of Virginia.

2. These immensely popular essays, which appeared in the *Atlantic Monthly*, described an "autocrat" narrator holding forth in a "mythical rooming house" on a wide variety of subjects, including religion, the art of conversation, literary societies, and vulgarisms in speech. P. 9.

3. Peter Gibian, *Opening and Closing the Conversation: Style and Stance from Holmes Senior to Holmes Junior*, in *THE LEGACY OF OLIVER WENDELL HOLMES, JR.* 187 (Robert W. Gordon ed., 1992).

4. White may overemphasize the role of personality in Holmes's "narrowing and refining his field of study." P. 13. The younger Holmes sketched a life plan based upon not only his "self-preoccupation and singlemindedness" (p. 14), but also his desire to distance himself from his father, whose achievements — at least according to his son — paled in comparison with his popularity:

Not having been blessed (or cursed) with his father's exuberant versatility the temptation to scatter his talents was probably less compelling, but the son's literary, philosophical, and artistic interests were certainly of sufficient intensity to have made diffusion of his energy a real possibility had not the example of his father given warning of the damage which may result from that diffusion.

Holmes, the devoted mother trapped in the constraints of the pre-Victorian era (pp. 14-17). White notes that she "passionately grasped" opportunities for achievement within the domestic sphere and directed her energies "almost exclusively toward the comfort of her husband and children."<sup>5</sup> The ancestors follow, in particular, the grandfathers — Judge Charles Jackson, member of the mercantile community and justice on the Supreme Judicial Court of Massachusetts, and the Reverend Abiel Holmes, minister and historian (pp. 17-19) — each illustrating distinct aspects of Holmes's secular and religious heritage.

After tracing Holmes's ancestral lineage, White turns to early environmental influences on Holmes: the provincial yet intellectual Brahmin Boston (pp. 20-24) and Harvard College (pp. 25-32). Harvard's classes and professors did not have a significant influence on Holmes.<sup>6</sup> Indeed, the college's criteria for ranking students belied its rigid atmosphere: "Points were assigned for student achievements and reduced for disciplinary violations, so that intellectual performances and what the faculty saw as moral performances were regarded as equivalents" (p. 25). Instead, Harvard introduced Holmes to what would become lifelong activities: avid reading, writing, and the cultivation of friendships and intimacies (pp. 26-27). After a discussion of the motivation Holmes received from the art critic John Ruskin and the transcendentalist sage Ralph Waldo Emerson — both of whom provided Holmes with a historicist perspective<sup>7</sup> — White closes the chapter by highlighting the tension between "the cumulative weight" of Holmes's ancestral heritage and Holmes's current self, as revealed through his literary achievements, membership in social clubs, and participation in the Civil War (p. 47). The author remarks that Holmes even attempted to distance himself from his ancestors' "natural bent" to literature (pp. 47-48), even though the literary style would later be omnipresent in his judicial opinions and legal writings.

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MARK DEWOLFE HOWE, *JUSTICE OLIVER WENDELL HOLMES: THE SHAPING YEARS 1841-1870* at 20-21 (1957) [hereinafter *HOWE, SHAPING YEARS*].

5. Pp. 15-16. Amelia Holmes succeeded in this endeavor: "It was her artistry that balanced the demands and desires of each family member, that soothed the tensions between the generations and the rivalries among the young, that provided the cement that held the [Holmes family] together." LIVA BAKER, *THE JUSTICE FROM BEACON HILL: THE LIFE AND TIMES OF OLIVER WENDELL HOLMES* 65 (1991). Baker also describes Holmes's siblings: Amelia Jackson Holmes, a "chatterbox," and Edward Jackson ("Ned") Holmes, a "practical joker." *Id.* Oliver Wendell Holmes "seems only rarely to have noticed [his siblings] in his preoccupation with trying to escape Dr. Holmes's shadow . . ." *Id.*; see also p. 495 n.61 (noting that Holmes "does not seem to have been particularly close to either sibling").

6. See *HOWE, SHAPING YEARS*, *supra* note 4, at 78.

7. Pp. 34-39. Such perspective "defined the course of societal change as continuous and inevitable, so that the 'past' was necessarily different from the 'present.'" P. 34.

Chapter Two — "The Civil War" — emphasizes an experience that had a profound impact on Holmes's view of the world. The war affected Holmes not only in the brute force of its imagery and its revelation of the insignificance of the individual in the face of collective and historical forces,<sup>8</sup> but also in providing a contrast with the conversational — and often inconclusive — milieu of his father.<sup>9</sup>

White imposes on the Civil War chapter a tripartite structure that extracts and situates Holmes's post hoc memorialization of the war in his professional life. The initial section of the chapter offers a chronology of Holmes's wartime experience, tracing his involvement — including the battles he saw and his injuries — between his enlistment in August 1861 and his departure from the war in July 1864 (pp. 50-65). The second part highlights Holmes's contemporaneous reactions to his experience. White sketches Holmes's increasing disenchantment with war and his evolving conception of loyalty: first to a cause, then to the regiment, and finally to himself.<sup>10</sup> It is this evolution, with its accompanying feelings of guilt,<sup>11</sup> for which Holmes sought to make amends in his recollections of the war in subsequent years. Such recollections constitute the subject of the third part of the chapter, in which White depicts an "official" bloodless and duty-laden conception of the war replacing Holmes's specific memories of the atrocities.<sup>12</sup> Unable to relinquish the war-like spirit, Holmes sought to draw analogies between his judicial work and the war. In addressing a fiftieth reunion of the Harvard

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8. The impact of the war on Holmes's life philosophy is revealed by statements such as: "[O]ur only but wholly adequate significance is as parts of the unimaginable whole." Oliver Wendell Holmes Jr., "Parts of the Unimaginable Whole" Address (June 28, 1911), *reprinted in* MAX LERNER, *THE MIND AND FAITH OF JUSTICE HOLMES* 27 (1943); "[Heroism involves] the ability to become a cog in a large, disciplined machine, to accept one's place as a single soldier in the unknowable movements of a huge army." Gibian, *supra* note 3, at 206; "No society has ever admitted that it could not sacrifice individual welfare to its own existence." OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 43 (1881). For Holmes, the insignificance of the individual in the face of the larger entity would ultimately evolve into an insignificance in the expanse of the universe and passage of time.

9. See Gibian, *supra* note 3, at 196 ("In the endless give-and-take of Holmes Senior's conversations, no assertion is ever final . . . [T]his chaos . . . might . . . stand as a troubling picture not only of a mind divided or a boardinghouse divided but of a nation divided.").

10. Pp. 65-72. Holmes demonstrated the latter loyalty in his decision not to reenlist after the expiration of his three-year term. He "had had enough of war . . . [He] desire[d] to preserve himself rather than . . . appear chivalric and honorable." Pp. 71-72.

11. Holmes's feelings of guilt stemmed from leaving the battlefield before dying or becoming a general: "All his life he worried that he had not met his obligation; if he had to do it again, he told friends, he would have stayed through the war." Hiller B. Zobel, *The Three Civil Wars of Oliver Wendell Holmes: Notes for an Odyssey (Part III)*, BOSTON B.J., Feb. 1983, at 24.

12. Pp. 72-86. Such a conception mirrors Holmes's increased detachment from the world around him; the Civil War planted in Holmes "[t]he deadening of sympathetic feelings, the Olympian aloofness, the spectator view . . . the belief in heroic action, the disbelief in causes . . . ." Saul Touster, *In Search of Holmes from Within*, 18 VAND. L. REV. 457, 470 (1965).

Class of 1861, for example, Holmes referred to the work of soldiers as "hammer[ing] out as compact and solid a piece of work as one can."<sup>13</sup> Although White acknowledges that, on one level, the analogy between war and judging could be viewed as "nonsensical," he recognizes that Holmes sought to replicate in his judicial pursuits the passions he experienced in war, and to "reassure himself that he was still participating in the fight . . . that he could continue to claim the privilege of having been touched with fire" (p. 86).

White appropriately locates an origin of Holmes's judicial passion in his Civil War background. Yet he fails to explore three other origins of Holmes's motivation. First, Holmes's mother endowed her son with a strong ambition. As Holmes wrote, "[B]y the temperament I get from my mother, without some feeling of accomplishment I feel as if it were time for me to die."<sup>14</sup> Second, Holmes's Puritan background — the spirit that dictates that "to take the easy way is to take the wrong way"<sup>15</sup> — impelled him onward. Finally, intellectual exploration motivated Holmes; his ambition manifested itself not in a quest for particular positions, but in a constant test of his mental capacity.<sup>16</sup>

White continues his exploration of Holmes's nonlegal life in the third chapter, tracing Holmes's "Friendships, Companions, and Attachments" between 1864 and 1882. After briefly discussing Holmes's attendance at Harvard Law School — "a desultory, tedious experience" (p. 91), yet one that convinced him that the law was to be his profession — White turns to Holmes's social acquaintances. Beginning in 1866, and continuing through 1913, Holmes embarked on nine sojourns to Great Britain to partake of the high

13. Holmes, "Parts of the Unimaginable Whole" Address (June 28, 1911), *reprinted in* LERNER, *supra* note 8, at 25, 27.

14. HOWE, *SHAPING YEARS*, *supra* note 4, at 280 n.h (quoting II *Holmes-Laski Letters* 1278 (Mark D. Howe ed., 1941)).

15. MARK DEWOLFE HOWE, *JUSTICE OLIVER WENDELL HOLMES: THE PROVING YEARS 1870-1882* at 282 (1963) [hereinafter HOWE, *PROVING YEARS*]; *see also Q&A: A Conversation with Paul Freund in HARVARD GAZETTE*, July 5, 1991, at 5 (Holmes's "Puritan work ethic" is revealed through his statement that "the work never is done, although the race is over."); HOWE, *SHAPING YEARS*, *supra* note 4, at 280 (Holmes "was always possessed by an impelling sense of time's urgency, — a Puritan's feeling of responsibility that no moment should be wasted."). White recognizes the Puritan influence on Holmes in, for example, Holmes's voracious reading and his self-control (p. 23), but he does not extrapolate such beliefs to the realms of ambition and motivation.

16. *See, e.g.,* HOWE, *SHAPING YEARS*, *supra* note 4, at 280-81 ("I assume that your ambition, like mine, cannot be satisfied by office or anything resting in the will of others but only by the trembling hope that you have hit the *ut de poitrine*." (quoting letter from Holmes to Judge Learned Hand (Mar. 18, 1922) (Holmes Papers (on file at Harvard Law School)))); *THE ESSENTIAL HOLMES: SELECTIONS FROM THE LETTERS, SPEECHES, JUDICIAL OPINIONS, AND OTHER WRITINGS OF OLIVER WENDELL HOLMES, JR.*, at 29 (Richard A. Posner ed., 1992) ("The thing I have wanted to do and want to do is to put as many new ideas into the law as I can, to show how particular solutions involve general theory, and to do it with style." (quoting letter from Holmes to Patrick Sheehan (Dec. 15, 1912) (Holmes Papers (on file at Harvard Law School)))).

society, culture, and conversations that life there availed (pp. 95-102). He would cultivate intimate relationships on these trips, particularly one — described in Chapter Seven — with Clare Castletown, a member of the “Ascendancy,” or Anglo-Irish land-owning class (pp. 230-49). Although Holmes visited Castletown several times in his travels, it is the correspondence between them that has generated the most attention. The pair traded letters from 1896 until 1927, often sharing their innermost thoughts. Holmes wrote to Castletown in September 1896 that a recent letter she sent “is what I have been longing for and is water to my thirst,”<sup>17</sup> and two years later, after returning from abroad, rejoiced: “Oh my dear what joy it is to feel the inner chambers of one’s soul open for the other to walk in and out at will.”<sup>18</sup> Holmes wrote perhaps his most passionate letter two weeks later, in language revealing that he had lost control of his emotions: “I long long long for you and think think think about you. You would be satisfied I think.”<sup>19</sup>

In stark contrast to such passion stands Holmes’s wife of fifty-two years, Fanny Dixwell Holmes. Fanny was not privy to her husband’s professional work, nor did she accompany him on his trips abroad.<sup>20</sup> In fact, she was more of a social recluse than he, in part, perhaps, because of an attack of rheumatic fever one month after marrying Holmes (p. 105). Although she possessed a strong wit, effectively played the role of hostess upon the Holmeses’ arrival in Washington, D.C., and provided emotional support for her husband, she was “relegated to a distinctly bounded realm of Holmes’ existence” (p. 107). For in the end, Holmes would not let anyone interfere with his work.

In Chapter Four, White turns to Holmes’s early legal scholarship, examining such work for its own sake and not merely as a precursor to his more famous subsequent work. The author notes that scholarship was “the professional center of [Holmes’s] life during his late twenties and thirties” (p. 112). Although such scholarship often derived from the works of others, Holmes refused to acknowledge, and even downplayed, his predecessors’ contributions.<sup>21</sup> White traces Holmes’s methodological shift from the philo-

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17. P. 232 (quoting letter from Holmes to Clare Castletown (Sept. 5, 1896) (Holmes Papers (on file at Harvard Law School))).

18. P. 240 (quoting letter from Holmes to Clare Castletown (Sept. 5, 1898) (Holmes Papers (on file at Harvard Law School))).

19. P. 242 (quoting letter from Holmes to Clare Castletown (Sept. 16, 1898) (Holmes Papers (on file at Harvard Law School))).

20. After accompanying her husband on two trips to England — as it turned out, her only such trips — “it was clear . . . that she did not take the same relish in the company of English socialites that he did.” P. 102.

21. For example, Holmes adopted a theory of Henry Maine’s in *The Common Law*, but asserted that: “I do not think [Maine] will leave much mark on the actual structure of jurisprudence.” P. 115 (quoting letter from Holmes to Frederick Pollock (Mar. 4, 1888) (I

sophical classification of legal subjects (pp. 117-18, 122-23) to systems of historical analysis (pp. 129, 133-34) to considerations of public policy (pp. 139-40). Despite such shifts, the new interpretive techniques did not completely displace their predecessors, but instead combined to provide Holmes with a distinctive methodology (p. 147).

White's examination of Holmes's early scholarship takes on new meaning by the time the familiar opening paragraph of *The Common Law* arrives in Chapter Five:

The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy . . . even the prejudices which judges share with their fellow men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.<sup>22</sup>

White notes that such memorable rhetoric, rather than Holmes's detailed exposition of areas of the law, led to the work's critical acclaim (p. 180). He reveals weaknesses in *The Common Law*, such as Holmes's purposive reading of cases,<sup>23</sup> inconsistencies with assertions in prior works,<sup>24</sup> and varying uses of history. The latter inconsistency is perhaps most evident: Holmes used history to explain anomalies in legal doctrine<sup>25</sup> and to serve as an instrument of policy,<sup>26</sup> and at other times he did not draw on history at all.<sup>27</sup> Yet White also emphasizes the originality and monument of Holmes's task and his success in showing that "legal doctrine is the product of a complex interaction" between "internal professional and extra-legal factors."<sup>28</sup>

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*Holmes-Pollock Letters* 31 (Mark D. Howe ed., 1941)); see also THE ESSENTIAL HOLMES, *supra* note 16, at xx ("lack of generosity toward [his predecessors] . . . was one of Holmes's sins") (emphasis omitted)).

22. P. 149 (quoting OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (1881)).

23. For instance, Holmes "insist[s]" that an objective theory of contracts predominates in "the most arguably subjective sphere of the common law — private bilateral contracts created as a result of the subjective preferences of 'free' individuals in a market setting. . . ." P. 178.

24. In reversing a previously-stated position that civil liability was not based on a "culpable state of mind" (p. 121), Holmes "was not loath to use historical research he had earlier employed for [this] purpose . . . to show, antithetically," that one's subjective intentions could result in liability. P. 157.

25. Some legal rules could "only be understood by reference to the infancy of procedure among the German tribes, or to the social condition of Rome under the Decemvirs." P. 170 (quoting OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 2).

26. Holmes's lectures on criminal law, torts, and contracts "used history . . . less as a source of doctrinal anomalies . . . than as support for . . . policy arguments themselves." P. 179.

27. "[A]ll [Holmes's] argument in the lecture on criminal law was conducted without any direct references to history." P. 158.

28. P. 195; see also BAKER, *supra* note 5, at 257 ("[Holmes's] principal discovery [in *The Common Law*], the one that set his book apart from the others and the one that later was to set Holmes apart from judges of his time . . . was the concept that law . . . was not at all static, but was evolutionary and responded to the social and economic environment of which it was

White extracts various themes that predominate throughout *The Common Law*: the emphasis on "experience" rather than "logic" in the development of legal doctrine; the foundation of doctrine in substantive — as opposed to formal — values; and the preference for objective<sup>29</sup> and external standards (pp. 180-81). The author fully discusses these themes in his thorough and meticulous 48-page tour of *The Common Law*. He summarizes and critiques the work in detail (pp. 148-79), explores the contemporaneous reaction to the work (pp. 182-91), and seeks to locate it in a historical perspective (pp. 191-93).

White does not, however, fully explore the origin of the themes that permeate *The Common Law*. Why experience over logic? The impact of the Civil War springs to mind: Holmes may have seen "his own convictions crumble when they felt the impact of reality."<sup>30</sup> Or perhaps his membership in the Metaphysical Club — a small, elitist philosophical society whose members included Charles Sanders Peirce, the founder of pragmatism<sup>31</sup> — laid the foundation for the elevation of experience.<sup>32</sup> Why objective, rather than subjective, standards? Perhaps because in Holmes's world view — forged on the battlefield — individuals were insignificant in the face of the larger enterprise.<sup>33</sup> Or perhaps the war experience encouraged Holmes to mete out punishment based on the degree of danger<sup>34</sup> created by an act rather than the actor's subjective intention.

Another theme running through *The Common Law* is Holmes's quest to organize the law. His unification of standards of civil and criminal liability, for example, was unprecedented. Though White finds it "striking" (p. 155), he does not uncover Holmes's rationale

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a part . . ."); THE ESSENTIAL HOLMES, *supra* note 16, at xxii ("The functional, evolutionary, policy-saturated perspective of *The Common Law* was a considerable innovation in legal scholarship.").

29. One commentator proclaimed that "[i]f there is a single, overriding, and repetitive theme running through Holmes's writing, it is the necessity and desirability of establishing objective rules of law . . ." Morton J. Horwitz, *The Place of Justice Holmes in American Legal Thought*, in THE LEGACY OF OLIVER WENDELL HOLMES, JR., *supra* note 3, at 32.

30. HOWE, SHAPING YEARS, *supra* note 4, at 285.

31. Pragmatism "is that distinctively American philosophical school that requires ideas, like engines, to be useful, workable, and practical if they are to be believed, if they are to have merit. It relies on experiment for truth and on action for justification." BAKER, *supra* note 5, at 216.

32. Baker asserts that the "nurtur[ing]" by the others in the group of "so many notions similar to [Holmes's] own could not but have bolstered [his] confidence in the speculations he had been advancing . . ." *Id.*

33. See *supra* note 8.

34. White illustrates the degree-of-danger factor in describing the criminal law of attempts, which punishes attempted crimes based on the level of danger posed by the defendant's act. P. 160. See, e.g., *Nash v. United States*, 229 U.S. 373, 377 (1913) ("[T]he law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree.").



for such an endeavor.<sup>35</sup> In the stylistic realm, White situates the obscurity of the language in *The Common Law* in its author's attempt to distinguish himself from his father, who utilized the genre of "popular" language (p. 183). White hypothesizes that "the most distinctive feature of Holmes as a stylist, his epigrammatic terseness, was consciously or unconsciously adopted as a badge of identity."<sup>36</sup> Yet the author does not carry over such personal-professional interrelations to the book's substantive realm, leading the reader to wonder about the effect of Holmes's inner self on the broad themes of *The Common Law*.

In Chapter Six — Holmes's "All Round View of the Law" — White integrates the subject's Civil War experience into his speeches and work. In a lecture to Harvard undergraduates in 1886, Holmes exhorted the audience to exercise the "barbaric thirst for conquest" and to "think great thoughts [by being] heroes as well as idealists."<sup>37</sup> A few months later, he accepted an honorary degree from Yale University "as an accolade, like the little blow upon the shoulder from the sword of a master of war . . ."<sup>38</sup> White is not mesmerized by such references. He persuasively notes the distinctions between war and scholarship, and suggests that Holmes's attempt to see himself as an "honorable soldier" may have been a justification for distinguishing himself, by pursuing scholarship, from the commercialization and "power-seeking" of his age (p. 215).

White next discusses Holmes's scholarship after *The Common Law*, in particular, the 1882 article, "The Path of the Law." This work mirrored *The Common Law* in its classification system and suspicion of logic, but broke new and memorable ground in its increased emphasis on a positivist approach to law, highlighted by the

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35. One impetus driving Holmes may have been his scientific methodology. See p. 42. Another may have been the zeitgeist: "Order, uniformity, certainty, and predictability were the main goals of legal as well as nonlegal writers of th[e] era." Horwitz, *supra* note 29, at 39.

36. P. 183. In analyzing the literary foundations for such memorable rhetoric, one commentator has observed that Holmes's language sounds "strong and impressive precisely because [it is] totally unqualified and unconditional"; he only marshals the data that support his conclusion. Mathias W. Reimann, *Holmes's Common Law and German Legal Science*, in *THE LEGACY OF OLIVER WENDELL HOLMES, JR.*, *supra* note 3, at 105. Another has noted that Holmes's sentences, often "built around the verb 'to be' . . . are definitions, autocratic edicts or clearly marked statements of firm personal belief intended to distinguish by fiat what is from what is not." Gibian, *supra* note 3, at 200-01.

37. P. 211 (quoting Oliver Wendell Holmes, Jr., "The Profession of the Law" (Feb. 17, 1886), in *THE OCCASIONAL SPEECHES OF JUSTICE OLIVER WENDELL HOLMES 28-30* (Mark Dewolfe Howe ed., 1962)) [hereinafter *OCCASIONAL SPEECHES*].

38. P. 214 (quoting Oliver Wendell Holmes, Jr., "On Receiving the Degree of Doctor of Laws" (June 30, 1886), in *OCCASIONAL SPEECHES*, *supra* note 37, at 32).

"bad man" metaphor<sup>39</sup> and the assertion that the law merely equalled "prophecies of what the courts will do in fact."<sup>40</sup>

Notwithstanding the strength of his scholarship, Holmes achieved his greatest renown from his opinions as a judge and Justice. After one year as a professor at Harvard Law School, he was appointed to the Supreme Judicial Court of Massachusetts (p. 202). Although Holmes, upon leaving the court two decades later, would describe his years on the Supreme Judicial Court as "the twenty happiest years of my life,"<sup>41</sup> he nevertheless encountered frustration when confronted with a caseload composed of "trifling or transitory matters" (p. 255). At times, Holmes sought to apply a broader view of the law, using the methodologies he had previously developed. Thus, he limited tort liability (pp. 264-65), applied external theories of criminal conduct (pp. 259-63), utilized an empirical approach in bailment cases (p. 273), and applied an objective theory of contracts.<sup>42</sup> In the few constitutional cases he addressed, Holmes foreshadowed future Supreme Court opinions by deferring to the legislature (pp. 280-86). His best-known state court opinions applied his theory of atomistic competition to the field of labor disputes (pp. 287-89). In his dissent in *Vegelahn v. Guntner*,<sup>43</sup> Holmes upheld the right of workers to picket, viewing such activity as a form of competition.<sup>44</sup> *Plant v. Woods*<sup>45</sup> followed, and Holmes dissented again, this time upholding union solidarity — in the form of strikes and boycotts — that interfered with economic relationships (pp. 289-91). Despite his involvement in such noteworthy cases, Holmes felt his chances for national recognition slipping away with the passage of time.

39. Holmes's hypothetical "bad man" acted in accordance with "what the courts could be expected to let him get away with." P. 219.

40. P. 219 (quoting Oliver Wendell Holmes, Jr., "The Path of the Law," Address Delivered at Boston University School of Law (Jan. 8, 1897), in OLIVER WENDELL HOLMES, COLLECTED LEGAL PAPERS 173 (1920)). Richard Posner noted that the "The Path of the Law" may be "the best article-length work on law ever written." THE ESSENTIAL HOLMES, *supra* note 16, at x.

41. P. 255 (quoting Oliver Wendell Holmes, Jr., "Twenty Years in Retrospect," Speech (Dec. 3, 1902), in OCCASIONAL SPEECHES, *supra* note 37, at 154).

42. Pp. 273-80. Holmes's across-the-board application of this theory often resulted, as White points out, in outcomes that "were not what at least one of the 'contracting' parties wanted." P. 280.

43. 167 Mass. 92, 104 (1896) (Holmes, J., dissenting) (dissenting from Court's decision to enjoin employees' picketing of employer).

44. Holmes reasoned, according to one commentator, that the picketing workers were competing with organized capital "for a larger share of the society's wealth. Workers and employers . . . were competitors, and the law ought to be neutral in their struggle." Mark Tushnet, *The Logic of Experience: Oliver Wendell Holmes on the Supreme Judicial Court*, 63 VA. L. REV. 975, 1038 (1977).

45. 176 Mass. 492, 504 (1900) (Holmes, J., dissenting) (dissenting from the court's decision to enjoin a union from strong-arming recalcitrant workers in an effort to compel them to join the union).

An opportunity to achieve national prominence presented itself in 1902 with President Theodore Roosevelt's nomination — and the Senate's confirmation — of Holmes to the U.S. Supreme Court. A number of fortuitous forces coalesced in Holmes's favor: the opening up of the "Massachusetts seat" on the Court upon the retirement of Justice Horace Gray; the assassination of former President William McKinley, thus precluding his intended nomination of Alfred Hemenway, a former law partner of Secretary of the Navy John Davis Long; and Holmes's personal relationship with both the new President, Theodore Roosevelt, and the junior Senator from Massachusetts, Henry Cabot Lodge (pp. 299-303). Holmes immediately recognized this window of opportunity; during a trip to Roosevelt's private residence prior to the nomination, Holmes "was waiting on Roosevelt, entertaining [Roosevelt's] children, focusing all his energies on not letting the nomination slip away" (p. 304).

Once on the Court, Holmes immersed himself in his work, writing opinions at a breakneck pace<sup>46</sup> and forgoing the social flirtations and intimacies of his past (pp. 308-11). He rarely interacted with his fellow Justices, viewing them primarily as hindrances who inhibited his writing.<sup>47</sup> In fact, the only two Justices who Holmes befriended during the course of his tenure on the Court were Chief Justice Melville Fuller, who had the power to assign opinions, and Justice Louis Brandeis, whose intellect Holmes admired and who taught Holmes the value of dissent (pp. 315-22).

One unifying theme throughout Holmes's early opinions was a deferential review of state legislation. Although it was his dissent in *Lochner v. New York*<sup>48</sup> that would achieve more lasting fame, an earlier opinion, *Otis v. Parker*,<sup>49</sup> sounded the same themes of deference to majoritarian rule. The *Lochner* dissent continued the tradition, upholding labor legislation with the now-famous statement that the Constitution "is not intended to embody a particular economic theory . . . ."<sup>50</sup> Yet Holmes was not, as White points out, a

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46. White does not explore the possible reasons for Holmes's prolific opinion-writing. Liva Baker posits two potential rationales: (1) "an unconscious desire to justify his survival in the war," and (2) "a similar desire to compensate for his childlessness." BAKER, *supra* note 5, at 383.

47. Pp. 314-15; see also BAKER, *supra* note 5, at 441 ("In the rare references Holmes made to the other justices in his correspondence, he seemed bored with — even, on occasion, contemptuous of — their emanations, oral and written.").

48. 198 U.S. 45, 74 (1905) (Holmes, J., dissenting).

49. 187 U.S. 606 (1902) (discussed at p. 323). In *Otis*, Holmes spoke for the Court in upholding a California statute that prohibited "[a]ll contracts for the sales of shares of the capital stock of any corporation . . . on margin," 187 U.S. at 607, on the ground that courts cannot invalidate every law judges believe to be "excessive, unsuited to its ostensible end, or based upon conceptions of morality with which they disagree." 187 U.S. at 608.

50. 198 U.S. at 75 (Holmes, J., dissenting). Holmes asserted that a constitution "is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon

fervent liberal or progressive Justice; he upheld legislation not because of its progressive character, but instead because it represented the majoritarian view. Perhaps no field marked Holmes as less of a progressive than civil rights.<sup>51</sup>

In *Giles v. Harris*,<sup>52</sup> Holmes wrote for the Court in denying equitable relief for a "political" wrong;<sup>53</sup> the Court refused to grant equitable relief allowing a black citizen of Alabama to register to vote before the legislature instituted a more restrictive registration system. *Bailey v. Alabama*<sup>54</sup> presented Holmes with another case fraught with racial implications. In *Bailey*, the Justice, in dissent, supported a presumption that a breach of a contract of servitude indicated an intent to injure or defraud one's employer (pp. 336-37). In methodological contrast, Holmes ignored presumptions in *United States v. Reynolds*.<sup>55</sup> In his concurrence in *Reynolds*, Holmes concentrated on the empirical consequences of the violations of surety contracts,<sup>56</sup> noting that "impulsive people with little intelligence or foresight may be expected to lay hold of anything that affords a relief from present pain . . . ."<sup>57</sup> Holmes's civil rights opinions thus may be read to reveal a stereotypical attitude that White locates in the Justice's heritage as an "upper-class Bostonian . . . [who] had few opportunities for associations with blacks" (p. 342).

Holmes's unsympathetic stance toward minorities extended beyond the sphere of race (pp. 335-48). In one case, the Justice de-

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the question whether statutes embodying them conflict with the Constitution of the United States." 198 U.S. at 76. Holmes also dissented from liberty of contract decisions in *Adair v. United States*, 208 U.S. 161, 190 (1908) (Holmes, J., dissenting) (dissenting from Court's decision to invalidate a statute prohibiting discharge of employees because of union membership) and *Coppage v. Kansas*, 236 U.S. 1, 26 (1913) (Holmes, J., dissenting) (dissenting from Court's decision to strike down a statute prohibiting employers from preventing their employees from joining labor organizations). See pp. 326-29.

51. The paragraphs that follow emphasize Holmes's treatment of minorities in the judicial context.

52. 189 U.S. 475 (1903).

53. P. 334. White astutely notes that such wrongs were of a constitutional — in addition to political — dimension.

54. 219 U.S. 219 (1911).

55. 235 U.S. 133 (1914).

56. These were agreements in which a surety paid the fine of a convicted person, who, in turn, worked a certain amount of time for the surety. If the convicted person failed to complete the work, he would be convicted and fined again. Pp. 337-38.

57. P. 338 (quoting from 235 U.S. at 150 (1914) (Holmes, J., concurring)). White, in comparing Holmes's views as manifested in these civil rights cases to his earlier pro-abolition views, persuasively notes that support for abolition did not precisely correlate with promoting equal rights for racial minorities. Although the author observes that Holmes failed to dissent from his contemporaries' hostile views of minorities, one cited example is unpersuasive: Holmes's rejection of the captaincy of a black regiment during the Civil War (p. 342) does not provide independent evidence of his views about blacks. This rejection — as White earlier noted (p. 68) — merely reflected Holmes's loyalty to his regiment.

ferred to a state governor's determination of whether an "emergency" existed, and thus whether the governor could jettison certain constitutional safeguards.<sup>58</sup> Holmes also found that authorities could detain anyone entering the United States unless that person exhausted his administrative remedies and affirmatively proved his American citizenship.<sup>59</sup> Even more shocking, the Justice later ruled that such border detentions, as final administrative decisions, were unreviewable by courts.<sup>60</sup> In these cases, Holmes failed to distinguish between aliens, to whom the statutes in question were directed, and American citizens, who would also be denied constitutional protections. A final example of his ultradeferential review is *Patsone v. Pennsylvania*,<sup>61</sup> in which Holmes upheld against an equal protection challenge a state statute that prevented unnaturalized foreign-born residents from "kill[ing] any wild bird or animal except in defence of person or property."<sup>62</sup>

Throughout the biography, White emphasizes Holmes's hunger for recognition, which was still unsated after thirteen years on the Court (p. 353). Holmes's anonymity would disappear, however, when a group of progressives — led by then-Harvard Law Professors Felix Frankfurter and Harold Laski — read Holmes's opinions to conform with their agenda and proselytized the Justice. The progressives — or "acolytes" — latched onto the Justice's *Lochner* dissent, his status as a "civilized" (in other words, nonbigoted) Puritan, and his judicial "realism."<sup>63</sup> While Holmes was satisfied with the long-awaited recognition, a concomitant anxiety crept in, as he worried that "his reputation might 'fall' or that criticism might follow praise . . ." (p. 371). Such criticism would not come from Holmes's admirers, who "were more interested in finding consistency than in finding paradox" (p. 390). For example, although Holmes's acolytes attacked expansive judicial decisionmaking in

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58. *Moyer v. Peabody*, 212 U.S. 78 (1909) (discussed at p. 335).

59. *United States v. Sing Tuck*, 194 U.S. 161 (1904). This proof was exceedingly difficult because of the lack of universal registration cards and the requirement that a citizen produce two witnesses attesting to his birth in the United States. P. 344.

60. *United States v. Ju Toy*, 198 U.S. 253 (1905) (discussed at pp. 345-46).

61. 232 U.S. 138 (1914). In discussing this case, White persuasively notes the inconsistency between Holmes's deference to "local experience" and his examination of other states' treatment of the issue. Pp. 347-48.

62. 232 U.S. at 143.

63. Pp. 364-65. In addition to calling attention to the work of Holmes, the acolytes were "very good to the old fellow and kept him young." SHELDON M. NOVICK, *HONORABLE JUSTICE: THE LIFE OF OLIVER WENDELL HOLMES* 311 (1989) (quoting letter from Holmes to Baroness Moncheur (Mar. 10, 1916) (Holmes Papers (on file at Harvard Law School))). In particular, the acolytes were "intellectually exciting, adventurous; their minds were unfettered, their spirits soared. Fearing perhaps the mental and spiritual stagnation that so often accompanies old age, [Holmes] prized their youthful qualities more and more as he grew older." BAKER, *supra* note 5, at 491. As White notes, they were "buffers against age, links to prosperity." P. 606.

the constitutional arena, they ignored such discretion in the sphere of the common law (p. 380). They failed to note the contradictions between Holmes's attacks on the concept of a federal common law<sup>64</sup> and application of his own version of such law in, for example, deciding whether young trespassers should be treated as children or adults,<sup>65</sup> and what steps a driver approaching a railroad crossing must take to avoid negligence.<sup>66</sup>

One set of beliefs that the acolytes did not question was Holmes's views on eugenics, a field more widely accepted at the time than it is now.<sup>67</sup> Indeed, the progressives viewed eugenics as a social "experiment" to be embraced (p. 408). Holmes, in particular, was most enthusiastic about this type of reform — calling it "near to the first principle of real reform."<sup>68</sup> Holmes revealed this enthusiasm to the public with his now-notorious statement in *Buck v. Bell*<sup>69</sup> that "three generations of imbeciles are enough."<sup>70</sup>

Even if Holmes was not enthusiastic about social and economic legislation,<sup>71</sup> he deferred to such laws as a Justice. White explains

64. Holmes found a federal common law "illusory" since state common law rules governed nonconstitutional state law disputes. Thus, federal judges "lacked justification for ignoring the states' sovereign dictates and inventing their own rules . . ." P. 389.

65. *United Zinc Co. v. Britt*, 258 U.S. 268 (1922). In *Britt*, discussed at page 381, two boys wandered onto private land and died after swimming in a toxic pool. Holmes ignored the relevant state law, which relied on juries for the determination of status as child or adult, and held that the boys were adult trespassers, thus precluding recovery by their parents.

66. *Baltimore and Ohio R.R. Co. v. Goodman*, 275 U.S. 66 (1927) (promulgating a universal rule that drivers approaching railroad crossings must get out of their cars, look, and listen for a train). White notes that this approach was "absurd," because of the inflexibility of the rule and because the conduct required by Holmes could be more dangerous than not stopping at all. P. 385.

67. As White states, "The idea of eugenic reform, to be effectuated through birth control, family planning, and voluntary or compulsory sterilization, was not thought to be a repressive one in the early twentieth century. On the contrary, it was associated with a paternalistic attitude toward the 'lower classes' . . ." P. 407. Another commentator confirmed this observation:

The American public was at the time caught up in a eugenics craze. Since the earliest years of the twentieth century, lecturers, books by enthusiastic laymen as well as scientists, articles in law journals, newspapers, and magazines had popularized the idea that selective breeding could vastly improve the composition of the human race.

BAKER, *supra* note 5, at 600.

68. BAKER, *supra* note 5, at 603 (quoting letter from Holmes to Harold J. Laski (May 12, 1927) (Holmes Papers (on file at Harvard Law School))).

69. 274 U.S. 200 (1927) (upholding statute providing for the compulsory sterilization of "mental defectives").

70. 274 U.S. at 207.

71. White fails to explore the roots of Holmes's lack of enthusiasm for reform. One origin may have been Holmes's father, who "never showed the ardor for reform . . . which other spokesmen of the Boston tradition felt it to be their obligation and privilege to indulge." HOWE, *SHAPING YEARS*, *supra* note 4, at 24. Another may have been a skepticism that developed at Harvard College and matured through his experience in the Civil War. See Reimann, *supra* note 36, at 74. Finally, the spirit of the age may have influenced Holmes: "His scorn of the mob, and perhaps of the very idea of democracy, was a common posture among nineteenth century Anglo-American legal thinkers." William P. LaPiana, *Victorian from*

this deference in discussing Holmes's dissent in *Tyson & Brother v. Banton*,<sup>72</sup> in which the Court struck down a state statute that fixed a maximum price for theater tickets. Holmes possessed the "fatalistic" view, according to White, that no individual could stop the "force of public opinion" (p. 401), and that laws passed by representatives of the majority should thus be upheld. Although White connects Holmes's "tolerance" of legislative regulation to his "fatalism," he fails to locate the origins of the latter philosophy in Holmes's inner self.<sup>73</sup> Holmes posited another rationale for deference to state legislatures in noting their role as "social laboratories"<sup>74</sup> — a term coined by Justice Louis Brandeis. Highlighting precedent that upheld Congress's regulatory authority, he dissented from the Court's ruling in *Hammer v. Dagenhart*<sup>75</sup> that Congress could not regulate "pre-commerce" conditions of child labor under the Commerce Clause (pp. 393-94). Similarly, he dissented in *Adkins v. Children's Hospital*,<sup>76</sup> disagreeing with the *Adkins* majority's invalidation of a minimum wage law for women. In dissent, he once again attacked the primacy of liberty of contract and questioned the assumption that women had achieved equality with men (pp. 396-97).

One area in which Holmes did not completely defer to legislatures, and, indeed, the area in which his opinions have achieved the greatest renown, is free speech. While on the Court, Holmes became increasingly libertarian in this sphere, although his free speech opinions often emphasized rhetoric over reasoning (pp. 412-13). Holmes applied the general law of criminal attempts to his early First Amendment cases (p. 418). He focused on the actor's intention to bring about a harm and the tendency of the action to produce that harm (p. 418). The initial cases in this arena arose in the context of World War I and the Espionage Act of 1917,<sup>77</sup> a statute that aimed to prevent the incitement of insubordination in the armed forces and the obstruction of recruitment or enlistment of soldiers (pp. 415, 573 n.14).

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*Beacon Hill: Oliver Wendell Holmes's Early Legal Scholarship*, 90 COLUM. L. REV. 809, 832 (1990).

72. 273 U.S. 418, 445 (1927) (Holmes, J., dissenting).

73. Holmes's fatalism may well have stemmed from his experiences in the Civil War, from which he came to realize the insignificance of the individual. See *supra* note 8.

74. Pp. 397-99 (discussing Holmes's dissent in *Truax v. Corrigan*, 257 U.S. 312 (1921), where the Court struck down a state statute that prohibited injunctions against peaceful picketing in labor disputes).

75. 247 U.S. 251, 277 (1918) (Holmes, J., dissenting).

76. 261 U.S. 525, 567 (1923) (Holmes, J., dissenting).

77. Espionage Act of 1917, ch. 30, 40 Stat. 217 (1917).

*Schenck v. United States*<sup>78</sup> was the first free speech case arising under the Espionage Act to engage Holmes (pp. 415-20). Writing for the majority in *Schenck*, the Justice held that Socialist Party officials could be prevented from distributing anticonscription leaflets to those drafted to serve in World War I. He reasoned that "the document[s] would not have been sent unless [they] had been intended to have some effect [and that effect would have been] to influence [those drafted] to obstruct the carrying [out of the war]."<sup>79</sup> Although Holmes utilized language later canonized — "man . . . falsely shouting fire in a theater and causing a panic"<sup>80</sup> and "clear and present danger"<sup>81</sup> — such rhetoric, at least as contained in *Schenck*, merely illustrated the law of criminal attempts. According to Holmes, the legislature had the power to restrict speech likely to result in an evil that Congress could prevent. In two other Espionage Act cases, Holmes extended this prohibition to obstruction attempts that were less obvious than those presented in *Schenck*. In the first, *Debs v. United States*,<sup>82</sup> the Justice again spoke for the Court in punishing Eugene Debs, a former Socialist Party candidate for President, for his remarks against the war and in support of those who had obstructed the war effort. Although Debs's remarks, made in the context of a Socialist convention, could have ultimately led to obstruction, Debs did not actively support this goal, thus distinguishing his case from *Schenck*. In the second Espionage Act case, *Frohwerk v. United States*,<sup>83</sup> Holmes again applied the law of attempts to a case in which the danger of obstruction was attenuated.<sup>84</sup>

The acolytes were disappointed with Holmes's opinions in the Espionage Act cases. Laski drew the Justice's attention to a 1919 article in *The New Republic* by Ernst Freund — a law professor at the University of Chicago — that seriously criticized the *Debs* case (pp. 423-24) and invited Holmes to meet Zechariah Chafee. Chafee, a young Harvard law professor, urged Holmes to strengthen his "clear and present danger" test and to distinguish his First Amendment analysis from the common law of attempts (p. 428). In addition to listening to the acolytes' suggestions, Holmes

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78. 249 U.S. 47 (1919).

79. 249 U.S. at 52.

80. 249 U.S. at 52.

81. 249 U.S. at 52.

82. 249 U.S. 211 (1919).

83. 249 U.S. 204 (1919).

84. [Even though i]t [did] not appear that [the obstructors made] any special effort to reach men who were subject to the draft . . . it [was] impossible to say that it might not have been found that the circulation of the [materials] was in quarters where a little breath would be enough to kindle a flame and that the fact was known and relied upon by those who sent the paper out.  
249 U.S. at 208-09.



personally witnessed the evils of the Red Scare — in the failed attempts to oust Frankfurter, Laski, and Dean Roscoe Pound from the Harvard Law School for their support of labor or status as Jews.<sup>85</sup>

Presumably as a result of these developments, Holmes applied a new free speech methodology in his dissenting opinion in *Abrams v. United States*.<sup>86</sup> In *Abrams*, a group of immigrants published and distributed leaflets advocating a strike among factory workers manufacturing weapons.<sup>87</sup> Although this could have more easily led to obstruction of the war effort than the activities at issue in the Espionage Act cases,<sup>88</sup> Holmes applied a more substantial “clear and present danger” test than previously utilized to uphold the free speech rights of the defendants. The Justice required a stricter intent for obstruction than was previously necessary<sup>89</sup> and stressed a new rationale for free speech: interaction in the public marketplace of ideas leads to “truth.”<sup>90</sup> Dissenting in *Abrams*, Holmes articulated a First Amendment jurisprudence that accorded distinctive significance to the freedom of speech, allowing the legislature to restrict it only if the nation’s existence were directly threatened (p. 436).

Although *Abrams* marked the turning point in Holmes’s First Amendment opinions, his subsequent opinions, as White remarks,

85. See BAKER, *supra* note 5, at 529-30.

86. 250 U.S. 616, 624 (1919) (Holmes, J., dissenting).

87. 250 U.S. at 621.

88. As White persuasively notes,

Schenck had delivered circulars to draftees, but the circulars had only spoken abstractly of the evils of conscription; Frohwerk had not delivered circulars to anyone, and the pamphlets he printed were not directed specifically at draftees; Debs had not said anything specific about draft resistance to World War I. The defendants in *Abrams* had printed leaflets and thrown them out the window of a factory, knowing they might be received by munitions workers, whose factory was in the vicinity.

P. 431 (footnotes omitted).

89. He required the aim to obstruct to be the “proximate motive” of the act. 250 U.S. at 627 (Holmes, J., dissenting), *discussed at* p. 432.

90. 250 U.S. at 630 (Holmes, J., dissenting) (“[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market . . .”). White posits two sources for such a test: Holmes’s cultural determinism and Chafee’s notion that a free trade in ideas leads to truth. P. 435. Yet he does not explore two other factors. First, Holmes’s war experience may have provided the seeds for the marketplace metaphor. As in war, power often determined victory in the marketplace of ideas. Holmes once defined truth as “the majority vote of that nation that can lick all others.” P. 435 (quoting letter from Holmes to Judge Learned Hand (June 24, 1918) (Holmes Papers (on file at Harvard Law School))). Generally, Holmes saw “free speech as itself a fighting faith — based on a verbal model of battle.” Gibian, *supra* note 3, at 212. A second origin may have been the influence of Holmes’s father, who warned that “fear of open discussion implies feebleness of inward conviction and [that] great sensitiveness to the expression of individual opinion is a mark of weakness.” BAKER, *supra* note 5, at 538 (quoting 2 THE WORKS OF OLIVER WENDELL HOLMES, SR. 109 (1892)). Holmes himself demonstrates adoption of this view in his “personal belief that the Espionage Act prosecutions should not have been brought” and in “prid[ing] himself on not being ‘hysterical’ with respect to unpopular speech.” P. 429.

do not systematically develop its rationale (p. 437). Holmes dissented from cases in which the Court invalidated legislation that prohibited the teaching of foreign languages in public schools.<sup>91</sup> In these cases, Holmes applied a lenient means-ends determination —

less than the heightened scrutiny of *Abrams* — to uphold the restrictive statutes (p. 440). Holmes appeared to move beyond the clear and present danger test in his dissent in *United States v. Schwimmer*,<sup>92</sup> in which he advanced yet another rationale for free speech: primacy for the “freedom for the thought we hate.”<sup>93</sup> Finally, White points out that Holmes’s rhetorical flourishes, such as the assertion in *Gitlow v. New York*<sup>94</sup> that “[e]very idea is an incitement,”<sup>95</sup> provide a “distinctive literary style” more than “a new First Amendment jurisprudence” (p. 445).

In the chapter’s conclusion, White details Holmes’s inconsistent justifications for free speech, from *Schwimmer*’s countermajoritarian “freedom for the thought we hate” to *Abrams*’s majoritarian marketplace of ideas. The author also notes Holmes’s failure to apply consistently the “clear and present danger” test articulated in *Abrams*, suggesting that Holmes “did not intend it as a doctrinal guideline at all . . . [but rather as] an attempt to create an appearance of consistency” with the earlier *Schenck* version of the test (p. 451). White captures one of Holmes’s major goals as a judge: “Holmes often treated judging as a kind of game, an exercise in which he tried to find ‘a form of words’ to justify a result . . . .”<sup>96</sup> Yet White’s analysis of Holmes’s First Amendment jurisprudence leaves the reader with some lingering questions. Did Holmes issue unconditional edicts to distance himself from the endless questions of his father?<sup>97</sup> Did the Justice aim to recall the spirit of war in lofty and memorable language?<sup>98</sup> Regardless of the reason for Holmes’s style, White effectively conveys to the reader an impor-

91. Pp. 438-41 (discussing *Meyer v. Nebraska*, 262 U.S. 390 (1923) and *Bartels v. Iowa*, 262 U.S. 404 (1923)). According to White, these foreign language cases “made Holmes focus on protecting speech as a component of liberty, rather than focusing on a democracy’s reliance upon speech in the search for truth.” P. 440.

92. 279 U.S. 644, 653 (1929) (Holmes, J., dissenting) (dissenting from Court’s decision to deny naturalization to a Hungarian pacifist who admitted in her application that she was not “willing to take up arms in defense of this country”).

93. 279 U.S. at 654-55, *quoted at* p. 447.

94. 268 U.S. 652 (1925).

95. 268 U.S. at 673 (Holmes, J., dissenting) (dissenting from Court’s decision to uphold statute outlawing advocacy of the overthrow of government), *quoted at* p. 444.

96. P. 452. For a discussion of Holmes’s rhetoric, see *supra* note 36.

97. See *supra* note 9.

98. One potential influence White does not discuss is James Fitzjames Stephen, an English scholar and judge, who possessed a “marvelously direct, muscular, vivid, witty, vivacious, economical style of writing” and a “moral hardness” that his friend Holmes may have adopted. JAMES FITZJAMES STEPHEN, *LIBERTY, EQUALITY, FRATERNITY AND THREE BRIEF ESSAYS* 9-10 (foreword by Richard A. Posner) (1991).

tant point: that Holmes, although doctrinally inconsistent, supplied philosophical justifications for free speech that remain influential today (p. 453).

After exploring the nuances of Holmes's Supreme Court opinions, White turns to the Justice's aging process in Chapter Thirteen. He notes that the process was "long, slow, and on the whole satisfactory," and that, in fact, his last decade on the Court may have been his most satisfying (p. 455). Holmes did not have significant health problems (pp. 455-56), and his last years bore witness to a variety of honors and achievements, climaxing in a nationwide radio address on his ninetieth birthday (pp. 462-65). Yet age would eventually catch up with the Justice, and in January 1932, with some prodding from Chief Justice Charles Evans Hughes, Holmes retired from the Court (pp. 466-67). For the first time in his life, "there was suddenly no central purpose, nothing to conserve his energies for and to concentrate his powers on" (p. 475). Three years later, two days shy of his ninety-fourth birthday, Holmes died.

White ends his biography with "A Concluding Assessment." The author expertly traces Holmes's significant characteristics — in particular, his ambition, passion, and interaction between "self" and "other"<sup>99</sup> — through his professional (pp. 476-79) and personal (pp. 482-84) lives. White also summarizes Holmes's scholarship and opinions, highlighting the Justice's rhetoric and his ambitious, unconventional methodological goals (pp. 480-81). Finally, the author justifies his own project by noting Holmes's status as "a figure of great significance" (p. 486). White suggests that the root of Holmes's mystique lies in his position as both "a figure of popular romance" and an extremely influential icon in American legal history (pp. 486-88).

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G.E. White's work is the most thorough biography ever written about Holmes.<sup>100</sup> It is remarkable in its depth and readability. In focusing upon the relationship between his subject's personal and professional lives, White has tackled his project on perhaps its deepest and most rewarding level. Throughout his tour of Holmes's life and work, the author constantly points out and cross-references

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99. White explores the self-other interaction most notably in contrasting Holmes's quest for power, in his "efforts to impose [his] will on [his] appointed tasks," with his powerlessness, in his belief "that the contributions of any individual would be dwarfed in the universe." P. 479.

100. Mark DeWolfe Howe, Holmes's official biographer, died after completing the first two volumes of his biography — taking the reader through *The Common Law*. See HOWE, *SHAPING YEARS*, *supra* note 4, and HOWE, *PROVING YEARS*, *supra* note 15. Two recent single-volume biographies, written by Liva Baker, see *supra* note 5, and Sheldon Novick, see *supra* note 63, lack the analysis of Holmes's legal scholarship and judicial opinions that White provides.

distinctive characteristics of his subject. In his final chapter, for example, White traces Holmes's ambition from his early years to his quest for national recognition, and explores his subject's "zest . . . for life" (p. 478). One superb example of White's success in this sphere is his analysis of Holmes's literary style.

In exploring the gold mines of Holmes's rhetoric, White methodically pursues his project, and is not mesmerized by the glittering aphorisms penned by his subject. The author frequently notes potential origins of Holmes's rhetoric: a reaction to his father — who wrote in the genre of popular prose — and a literary heritage and inclination. White conducts his analysis of Holmes's opinions and writings on several levels, never sacrificing examinations of style or reasoning. Throughout the biography, the author parses Holmes's opinions and writings in extraordinary detail, examining his language meticulously and noting analytical gaps that the Justice's rhetoric often obscures. White effectively paints the picture of a Justice more interested in "stylistic elegance and pithiness" than "technical legal analysis and exegesis" (p. 410).

The author's exposition of Holmes's style is impeccable, in part because he located its genesis in Holmes's inner self. White draws on Holmes's inner self as a background to professional decisions, such as immersing himself in scholarship, joining the Massachusetts Supreme Judicial Court, positioning himself for a seat on the U.S. Supreme Court, and seeking recognition through his association with the acolytes.

Unfortunately, White does not integrate Holmes's personal life with the broad themes — such as judicial deference and a preference for objective standards — he espoused in his professional capacity. Holmes's Civil War experience serves as an example of this omission. White magnificently traces Holmes's post hoc reaction to the Civil War, revealing his subject's honorable and majestic recollection of the war, but he does not continue the analysis on the deeper level of the broad themes running through Holmes's judicial opinions and writings. For example, White does not treat the Civil War as a formative intellectual experience, sowing the seeds, perhaps, of Holmes's preference for experience over logic or his preference for objective rather than subjective standards. Nor does White emphasize the wartime roots of Holmes's belief in the insignificance of the individual. This belief, which is central to Holmes's persona, may have had a substantial impact on theories he brought to the bench, such as a deferential review of legislation. Although White adequately describes Holmes's reaction to the Civil War, this examination fails to extend through Holmes's judicial work.

To state that White could have explored further interactions between Holmes's personal and professional lives is not to diminish

what the author has accomplished. Indeed, in endeavoring to map a figure's profound personal characteristics to his lifetime of achievement, one cannot possibly examine every conceivable interaction. White's achievement is that he started down this worthwhile path. With a thoroughness essential to his task and with an organization and creativity that ensure this work a place in the pantheon of great biographies, G.E. White has written a book that promises to be accessible and rewarding to all.

— *Michael A. Carrier*